A

TAN SRI ERIC CHIA ENG HOCK

v.

PP

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ALAUDDIN MOHD SHERIFF FCJ
NIK HASHIM FCJ
C AUGUSTINE PAUL FCJ
[CRIMINAL APPLICATION NO: 05-65-2005 (W)]
28 DECEMBER 2006

CRIMINAL PROCEDURE: *Appeal - Appeal to Federal Court - Competency - Appeal against decision of Court of Appeal affirming decision of High Court reversing decision of Sessions Court in revisionary capacity - Whether incompetent - Whether High Court not exercising original jurisdiction - Right of appeal to Federal Court - Whether qualified and restricted by constitutional provisions - Courts of Judicature Act 1987, ss. 22-25, 31, 87 - Federal Constitution, arts. 121(2)(a), 128(3)*

CRIMINAL PROCEDURE: *Jurisdiction of court - Federal Court - Exercise of power of review - Power to prevent injustice or abuse of process - Scope and ambit - Validity of enabling rule thereof - Rules of the Federal Court 1995, r. 137 - Courts of Judicature Act 1964, s. 16(a) - Civil Law Act 1956, s. 3(1)(a)*

CRIMINAL PROCEDURE: *Jurisdiction of court - High Court - Exercise of original jurisdiction - High court exercising power of revision to disturb finding of subordinate court - Whether exercising original jurisdiction - Revisionary power thereof - Whether could be equated with supervisory power - Courts of Judicature Act 1964, ss. 22 – 25, 31, 87 - Criminal Procedure Code, s. 323*

CONSTITUTIONAL LAW: *Constitution - Interpretation - Appellate jurisdiction of Federal Court - Articles 121(2)(a) and 128(3) - Whether in conflict with each other - Word "jurisdiction" in Articles - Whether importing same meaning - Whether art. 128(3) a proviso to art. 121(2)(a)*

WORDS & PHRASES: *"Jurisdiction" - Articles 121(2)(a) & 128(3), Federal Constitution - Meaning and import*

The accused in this case was aggrieved by the decision of the Court of Appeal affirming the decision of the High Court that reversed a decision of the Sessions Court pursuant to its power of revision under s. 31 Courts of Judicature Act 1964 ('CJA') and s. 323 Criminal Procedure Code – and in the circumstances – filed a notice of appeal in the Federal Court under s. 87 CJA and a motion under r. 137 Rules of the Federal Court 1995 praying for the Federal Court to exercise its inherent jurisdiction to review the decision of the Court of Appeal.

The prosecution raised a preliminary objection that the appeal was incompetent, and further that r. 137 was invalid for failing to satisfy the requirements of s. 16 CJA under which it was made. More specifically, it was argued that the appeal could not be competent as: (i) under s. 87 CJA, the appellate (criminal) jurisdiction of the Federal Court was confined to a decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter ***decided by the High Court in its original jurisdiction,*** whereas, in the present case, not only that the criminal matter originated in the subordinate court, namely the Sessions Court, but that the High Court, when reviewing the ruling of the Sessions Court, was only exercising its revisionary power under the relevant statutes, and ***not its original jurisdiction.*** It was further argued that s. 87 CJA, while clearly consistent with art. 128(3) of the Federal Constitution, did not violate art. 121(2)(a) thereof, notwithstanding that art. 121(2)(a) seemed to have provided the Federal Court with an unfettered jurisdiction to determine appeals from the Court of Appeal and the High Court. In retort, the accused asserted that a decision made in the exercise of revisionary power, such as made by the High Court herein, formed part of the original jurisdiction of the High Court with the result that the decision was rendered appealable under s. 87 CJA. Additionally, it was pointed out that the revisionary power of the High Court ought to be equated with its supervisory power and that r. 137 clearly came within the ambit of s. 16(a) CJA and was therefore lawful.

Under the weight of the forceful arguments, it thus fell upon the learned justices of the apex court to determine: (i) whether s. 87 CJA was constitutionally valid bearing in mind the effect and purport of arts. 121(2)(a) & 128(3) of the Federal Constitution; (ii) whether in exercising its revisionary power herein, the High Court was exercising its original jurisdiction within the meaning of s. 87 CJA; (iii) whether the appeal herein was competent in law;

A and (iv) whether on the facts and in the circumstances the accused ought to be allowed to invoke r. 137 to seek a remedy thereunder.

Held (allowing preliminary objection in respect of
B **competency of appeal)**
Per Augustine Paul FCJ:

(1) The word "jurisdiction" can mean, in its narrow and strict sense, the authority and power to hear and determine cases and, in the wider sense, the manner in which the power is
C to be exercised. It has been construed by the courts in both the senses or only in one sense depending on the context in which it has been used. (para 8)

(1a) The language of art. 121(2)(a) shows in clear terms that it
D deals with the authority to determine appeals and not otherwise. This is the meaning of the words in the narrow sense. Hence, if the word "jurisdiction" in art. 128(3) can be construed in the wider sense there will be harmony between the two articles. (para 10)

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(2) The word "jurisdiction" has been used in art. 128(3) in the same context as it has been used in art. 121(2)(a), and hence must carry the same meaning. The corollary is that there is a conflict between the general power contained in
F art. 121(2)(a) and its qualification contained in art. 128(3). While art. 121(2)(a) gives an unqualified right of appeal to the Federal Court, art. 128(3) provides that the right shall be such as may be provided by federal law, thereby empowering the legislature to restrict the right of appeal to
G the Federal Court. (paras 10 & 11)

(3) As art. 128(3) is a limitation and qualification upon the general power contained in art. 121(2)(a) it must be construed as a proviso to art. 121(2)(a). Accordingly, when art 128(3) is read as a proviso to art. 121(2)(a) the
H jurisdiction of the Federal Court to determine appeals shall be such as may be provided by federal law. This approach will give a harmonious interpretation to art. 121(2)(a) and art. 128(3) and will not affect the validity of either one of them. The result is that the constitutionality of s. 87 cannot
I be impugned as it is a federal law enacted to confer jurisdiction on the Federal Court to determine appeals on the authority of arts. 121(2)(a) and 128(3) read together. (para 13)

(3a) Consequently, the notice of appeal filed by the accused against the decision of the Court of Appeal is not competent. The preliminary objection of the prosecution in this respect is thus upheld. (para 13)

(4) The inherent jurisdiction of the superior courts under the common law has been made available to Malaysia by s. 3(1)(a) of the Civil Law Act 1956. Accordingly it comes within the meaning of art 121(2)(c) of the Federal Constitution as it is a jurisdiction that has been preserved, not by, but under federal law. (para 16)

(4a) Rule 137 comes within the scope of s. 16(a) of the CJA and therefore lawful. Even if it can be argued that r. 137 does not conform with the requirements of s. 16(a), it makes no difference, as r. 137 merely preserves what has been brought into force by s. 3(1)(a) of the Civil Law Act 1956. Moreover, the power of this court to hear any application or to make any order as may be necessary to prevent injustice under r. 137 has already been recognised in a plethora of cases and authorities. (para 17)

(4b) The language of r. 137 is not restrictive as to limit its application to only reviewing decisions of the Federal Court. The words "hear an application" and "make any order" therein are wide enough to extend the making of orders even in respect of matters that did not arise in the Federal Court. (para 18)

(4c) In the circumstances, the inherent powers of the Federal Court under r. 137 can be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy. The accused is therefore entitled to pursue his complaint in this court in the exercise of its inherent jurisdiction under r. 137. The burden is however on him to satisfy this court that the requirements of r. 137 have been complied with. (paras 22 & 23)

Per Richard Malanjum CJ (Sabah & Sarawak) (concurring):

(1) To determine whether or not a particular exercise of power by the High Court is made pursuant to its original jurisdiction, it must necessarily depend on the statutory provision which governs it. (para 35)

(2) Sections 22 to 25 CJA stipulate what are the original jurisdictions of the High Court. Section 31 under which the learned High Court judge in this matter acted upon is however not included. That being so, the view as expressed by Mohamed Dzaiddin J (as he then was) in *Tengku Abdul Muiz Shah & Ors v. PP viz.* that: "Except for certain articles in the Constitution, the powers and jurisdiction of the High Court are governed by the Courts of Judicature Act 1964. In the sphere of criminal jurisdiction, the High Court has three jurisdictions, namely original, appellate and revisionary. With regard to its original jurisdiction, s. 22(1)(a)(i) of the Act states that the High Court shall have jurisdiction to try all offences committed within its local jurisdiction … Lastly, under s. 31 of the Act, the High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts" – must sum up the true position of the law. In other words, the exercise of revisionary power by the High Court judge is not in law an exercise of his original jurisdiction and hence does not come within the ambit of s. 87 CJA. (paras 36 & 37)

(3) The revisionary power of the High Court cannot be equated with its supervisory power. Although the end result of each may be quite similar, and although s. 35 of the CJA refers to supervisory jurisdiction of the High Court together with its revisionary jurisdiction, the exercise of supervisory power is generally in relation to the additional powers of the High Court given under s. 25 of CJA to issue what is commonly known as the prerogative writs such as certiorari, mandamus and prohibition. It entails the commencement of a proceeding in the High Court itself unlike an exercise of revisionary power where it is preceded with an existing proceeding in the subordinate court. (para 38)

[Notice of appeal struck out for want of jurisdiction under s. 87 CJA. But leave granted for accused to seek to obtain remedy under r. 137]

Bahasa Malaysia *translation of headnotes*

Tertuduh dalam kes ini terkilan dengan keputusan Mahkamah Rayuan kerana mengesahkan keputusan Mahkamah Tinggi yang mengakas satu keputusan Mahkamah Sesyen di bawah kuasa semakannya di bawah s. 31 Akta Mahkamah Kehakiman 1964 ('AMK') dan s. 323 Kanun Acara Jenayah – dan dengan yang

demikian – telah memfail satu notis rayuan di Mahkamah Persekutuan di bawah s. 87 AMK dan satu usul di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 memohon Mahkamah Persekutuan supaya melaksanakan bidangkuasa sedia adanya guna menyemak keputusan Mahkamah Rayuan.

Pihak pendakwaan telah membangkitkan bantahan awal bahawa rayuan adalah tidak berkompeten, dan bahawa k. 137 adalah tak sah kerana gagal mematuhi kehendak s. 16 AMK di bawah mana kaedah tersebut dibuat. Secara yang lebih spesifik, dihujahkan bahawa rayuan adalah tidak berkompeten oleh kerana: (i) di bawah s. 87 AMK, bidangkuasa rayuan (jenayah) Mahkamah Persekutuan hanya meliputi keputusan Mahkamah Rayuan dalam bidangkuasa rayuannya berhubung mana-mana halperkara jenayah yang ***diputuskan oleh Mahkamah Tinggi dalam bidangkuasa asalnya***, manakala, dalam kes semasa, bukan sahaja halperkara jenayah berbangkit di mahkamah rendah, iaitu di Mahkamah Sesyen, tetapi Mahkamah Tinggi juga, semasa menyemak keputusan Mahkamah Sesyen, hanya melaksanakan kuasa semakan di bawah statut-statut yang berkaitan, dan ***bukanlah melaksanakan bidangkuasa asalnya.*** Dihujahkan seterusnya bahawa s. 87 AMK, sementara jelas konsisten dengan per. 128(3) Perlembagaan Persekutuan, juga tidak bertentangan dengan per. 121(2)(a)nya, walaupun per. 121(2)(a) tersebut nampaknya memberikan Mahkamah Persekutuan bidangkuasa tanpa had untuk memutuskan rayuan-rayuan dari Mahkamah Rayuan dan Mahkamah Tinggi. Tertuduh sebaliknya mengatakan bahawa mana-mana keputusan yang dibuat ekoran dari pelaksanaan kuasa semakan, sepertimana yang dibuat oleh Mahkamah Tinggi di sini, adalah sebahagian dari pelaksanaan bidangkuasa asal Mahkamah Tinggi sekaligus menjadikan keputusan tersebut boleh dirayui di bawah s. 87 AMK. Dihujahkan selanjutnya bahawa kuasa semakan Mahkamah Tinggi seharusnya disamakan dengan kuasa pengawasannya, dan bahawa k. 137 jelas terangkum ke dalam skop s. 16(a) AMK dan dengan itu adalah sah.

Atas hujah-hujah yang kukuh ini, maka yang arif hakim-hakim mahkamah tertinggi telah mengambil kewajipan untuk memutuskan persoalan-persoalan berikut, iaitu: (i) sama ada s. 87 AMK sah dari segi perlembagaan dengan mengambilkira kesan dan kuatkuasa per. 121(2)(a) & 128(3) Perlembagaan Persekutuan (ii) sama ada dalam melaksanakan kuasa semakannya di sini, Mahkamah Tinggi telah melaksanakan bidangkuasa asalnya seperti yang dimaksudkan oleh s. 87 AMK; (iii) sama ada rayuan di sini berkompeten di sisi

undang-undang; dan (iv) sama ada di atas fakta dan keadaan kes tertuduh patut dibenar membangkitkan k. 137 bagi mendapatkan remedi di bawahnya.

Diputuskan (membenarkan bantahan awal berkaitan kekompetenan rayuan)
Oleh Augustine Paul HMP:

(1) Perkataan "bidangkuasa" boleh bermakna, dalam maksudnya yang sempit, autoriti dan kuasa untuk mendengar dan memutuskan kes-kes dan, dalam maksudnya yang luas, cara bagaimana kuasa tersebut harus dilaksanakan. Mahkamah telah mentasfirkannya dalam kedua-dua maksud atau salah satu dari maksud-maksud tersebut bergantung kepada konteks ianya digunakan.

(1a) Perbahasaan per. 121(2)(a) menunjukkan dengan jelas bahawa ia adalah berhubungan dengan autoriti untuk memutuskan rayuan-rayuan dan bukan sebaliknya. Ini adalah makna perkataan dalam maksudnya yang sempit. Oleh itu, jika perkataan "bidangkuasa" di dalam per. 128(3) boleh ditafsir pada maksudnya yang lebih luas, keharmonian akan wujud di antara kedua perkara ini.

(2) Perkataan "bidangkuasa" telah digunakan di dalam per. 128(3) dalam konteks yang sama sepertimana ia digunakan di dalam per. 121(2)(a), dan dengan itu harus membawa pengertian yang serupa. Oleh yang demikian, wujud konflik di antara kuasa am yang terkandung di dalam per. 121(2)(a) dan penghadan terhadap kuasa am tersebut yang terkandung di dalam per. 128(3). Sementara per. 121(2)(a) memberi hak tanpa had untuk merayu ke Mahkamah Persekutuan, per. 128(3) memperuntukkan bahawa hak tersebut hendaklah mengikut apa yang diperuntukkan oleh undang-undang persekutuan, sekaligus membolehkan badan perundangan mengekang hak untuk merayu ke Mahkamah Persekutuan.

(3) Oleh kerana per. 128(3) adalah menghad dan memberi syarat kepada kuasa am yang terkandung di dalam per. 121(2)(a) maka ia harus ditafsirkan sebagai proviso kepada per. 121(2)(a). Ianya mengikut bahawa, dengan membaca per. 128(3) sebagai proviso kepada per. 121(2)(a), bidangkuasa Mahkamah Persekutuan untuk memutuskan rayuan adalah seperti yang diperuntukkan oleh undang-undang persekutuan. Pendekatan sebegini akan memberi tafsiran yang berharmoni

kepada per. 121(2)(a) dan 128(3) tanpa menjejaskan kesahan kedua-dua peruntukan tersebut. Akibatnya, keperlembagaan s. 87 AMK tidak lagi boleh dipertikaikan kerana ia merupakan undang-undang persekutuan yang digubal bagi memberikan bidangkuasa kepada Mahkamah Persekutuan untuk memutuskan rayuan-rayuan atas autoriti per. 121(2)(a) dan 128(3) dibaca secara bersama.

(3a) Ianya dengan itu mengikut bahawa notis rayuan yang difailkan oleh tertuduh terhadap keputusan Mahkamah Rayuan adalah tidak berkompeten. Sekaligus, bantahan awal pihak pendakwaan berkaitan isu ini dibenarkan.

(4) Bidangkuasa sedia ada mahkamah-mahkamah atasan di bawah common law telah diperluaskan ke Malaysia melalui s. 3(1)(a) Akta Undang-Undang Sivil 1956. Oleh itu, ianya termasuk ke dalam maksud per. 121(2)(c) Perlembagaan Persekutuan kerana ia merupakan bidangkuasa yang telah dipelihara, bukan oleh, tetapi di bawah undang-undang persekutuan.

(4a) Kaedah 137 adalah termasuk dalam skop s. 16(a) AMK dan adalah sah. Jikapun ianya boleh dihujah bahawa k. 137 tidak mematuhi kehendak s. 16(a), ia tidak menjejaskan apa-apa oleh kerana k. 137 hanya memelihara apa yang dikuatkuasakan oleh s. 3(1)(a) Akta Undang-Undang Sivil 1956. Selain itu, kuasa mahkamah ini untuk mendengar sebarang permohonan atau membuat sebarang perintah perlu bagi mencegah ketidakadilan di bawah k. 137 sudah diakui oleh banyak kes dan autoriti.

(4b) Perbahasaan k. 137 tidak bersifat mengekang sehingga menghadkan pemakaiannya hanya kepada menyemak keputusan-keputusan Mahkamah Persekutuan semata-mata. Perkataan "mendengar mana-mana permohonan" dan "membuat apa-apa perintah" di dalamnya adalah cukup luas untuk menampung pemberian perintah-perintah walaupun berkaitan perkara-perkara yang tidak berbangkit di Mahkamah Persekutuan.

(4c) Oleh yang demikian, kuasa sedia ada Mahkamah Persekutuan di bawah k. 137 boleh dituntut bagi menghalang suatu ketidakadilan atau suatu salahguna proses mahkamah di mana tidak terdapat remedi-remedi lain selain darinya. Tertuduh dengan itu berhak untuk membangkitkan rungutannya di

A mahkamah ini atas pelaksanaan kuasa sedia adanya di bawah k. 137. Bagaimanapun, tanggungan adalah atas beliau untuk memuaskan mahkamah bahawa kehendak k. 137 telah dipenuhi.

B **Oleh Richard Malanjum HB (Sabah & Sarawak):**

(1) Penentuan sama ada atau tidak suatu pelaksanaan kuasa oleh Mahkamah Tinggi itu dibuat di bawah bidangkuasa asalnya adalah bergantung kepada peruntukan statut yang mengawalinya.

C

(2) Seksyen 22 hingga 25 AMK membentangkan senarai bidangkuasa asal Mahkamah Tinggi. Seksyen 31 di bawah mana yang arif hakim Mahkamah Tinggi di sini bertindak bagaimanapun tidak termasuk dalam senarai ini. Dalam D keadaan sedemikian, pandangan yang diutarakan oleh Mohamed Dzaiddin H (sepertimana beliau waktu itu) di dalam *Tengku Abdul Muiz & Ors v. PP,* iaitu, bahawa "terkecuali beberapa fasal dalam Perlembagaan Persekutuan, kuasa-kuasa dan bidangkuasa Mahkamah Tinggi adalah E dikawalselia oleh Akta Mahkamah Kehakiman 1964. Dalam bidangkuasa jenayah, Mahkamah Tinggi mempunyai tiga bidangkuasa, iaitu bidangkuasa asal, rayuan dan semakan. Berhubung bidangkuasa asalnya, s. 22(1)(a)(i) Akta menyatakan bahawa Mahkamah Tinggi hendaklah mempunyai F bidangkuasa untuk membicarakan semua kesalahan yang dilakukan di dalam bidangkuasa tempatannya … Akhir sekali, di bawah s. 31 Akta, Mahkamah Tinggi bolehlah melaksanakan kuasa-kuasa semakannya terhadap prosiding-prosiding dan halperkara jenayah yang berbangkit di G mahkamah rendah" – seharusnya merumuskan kedudukannya yang sebenar di sisi undang-undang. Dengan kata lain, pelaksanaan kuasa semakan oleh Mahkamah Tinggi bukanlah suatu pelaksanaan bidangkuasa asal di sisi undang-undang dan dengan itu tidak termasuk ke dalam skop s. 87 AMK.

H

(3) Kuasa semakan Mahkamah Tinggi tidak boleh disamakan dengan kuasa pengawasannya. Walaupun akibat dari kedua-duanya kelihatan serupa, dan walaupun s. 35 AMK merujuk kepada kuasa pengawasan Mahkamah Tinggi bersama-sama I dengan bidangkuasa semakannya, pelaksanaan kuasa pengawasan pada umumnya melibatkan kuasa-kuasa tambahan Mahkamah Tinggi yang diberikan di bawah s. 25 AMK untuk mengeluarkan apa yang lazimnya dipanggil writ

prerogatif seperti certiorari, mandamus dan prohibition. Semua itu melibatkan pemulaan prosiding di Mahkamah Tinggi, tidak seperti pelaksanaan kuasa semakan yang didahului dengan prosiding sedia ada di mahkamah rendah.

[Notis rayuan dibatalkan kerana ketiadaan bidangkuasa di bawah s. 87 AMK. Namun, kebenaran diberi untuk tertuduh meneruskan tuntutan remedi di bawah k. 137]

Case(s) referred to:

A Venkateswara Rao v. K Sibaiah AIR [1978] AP 403 ***(refd)***
Abubacker Kunju v. Thulasidas [1995] Cr LJ 1664 ***(refd)***
Ahmad Yani Ismail & Anor v. Inspector General of Police & Ors [2005] 4 MLJ 636 ***(refd)***
Anowar Hussain v. Ajoy Kumar AIR 19599 Assam 28 ***(refd)***
Balmer Lawrie and Co Ltd v. Assam Brook Estates Ltd AIR [1979] Cal 64 ***(refd)***
Blackwood v. R [1882] 8 App Cas 82 ***(refd)***
Bywater v. Brandling [1828] 7 B & C 643 ***(refd)***
Canada Sugar Refining Co v. R [1898] AC 741 ***(refd)***
Chan Yock Cher v. Chan Teong Peng [2005] 4 CLJ 29 FC ***(refd)***
Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***
Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***
Commissioner of Income Tax, Punjab v. Shree Jagan Nath AIR [1957] Punjab 226 ***(refd)***
Connelly v. DPP [1964] 2 All ER 401 ***(refd)***
Courtauld v. Legh [1869] LR 4 Ex 126 ***(refd)***
Dato Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***
Eastbourne Corpn v. Fortes Ltd [1959] 2 All ER 102 ***(refd)***
Emperor v. Nazir Ahmad AIR [1945] PC 18 ***(refd)***
Filotek Trading Sdn Bhd v. Buildcon-Cimaco Concrete Sdn Bhd [1999] 4 CLJ 135 HC ***(refd)***
Garthwaite v. Garthwaite [1964] 2 All ER 233 ***(refd)***
Gayler v. Wilder 13 L Ed 504 ***(refd)***
Goodwin v. Phillips 7 CLR 1 ***(refd)***
Govt of the Province of Bombay v. Hormusji Manekji AIR [1947] PC 200 ***(refd)***
Hari Shankar Dinanath v. State of Madhya Pradesh AIR [1953] Nag 254 ***(refd)***
Jennings v. Kelly [1940] AC 206 ***(refd)***
KM Nanawati v. State of Bombay AIR [1961] SC 112 ***(refd)***
Ku Izham Ku Adnan v. PP [1998] 2 CLJ 956 HC ***(refd)***
Kunhammad v. Abdul Kader [1977] KLT 840 ***(refd)***
Kurukshetra University v. State of Haryana AIR [1977] SC 2229 ***(refd)***
Lam Kong Co Ltd v. Thong Guan Co Ptd Ltd [2000] 3 CLJ 769 FC ***(refd)***
Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***
Local Government Board v. South Stonehan Union [1909] AC 57 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***
Mahesh Chandra Gupta v. State of MP AIR [1991] MP 226 ***(refd)***
Manoharlal Chopra v. Seth Hiralal AIR [1962] SC 527 ***(refd)***
Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***
Marudayya Thevar v. Shanmugasundara Thevar AIR [1926] Mad 139 ***(refd)***
Mort v. Bradley [1916] SALR 129 ***(refd)***
Pambhi v. State AIR [1952] All 526 ***(refd)***
R v. Shurmer [1886] 17 QBD 323 ***(refd)***
Raj Rani v. Dwarka Nath AIR [1933] Oudh 491 ***(refd)***
Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Re Gurunath Narayan Betgori (Criminal Revision Application No 80 of 1924) AIR [1924] Bom 485 ***(refd)***
Re Lloyds Bank (Criminal Application for Revision No 261 of 1933), 35 Cr LJ 1028 ***(refd)***
Sarwan Ram v. Amar Nath AIR [1980] Punj & Haryana 162 ***(refd)***
Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha AIR [1961] SC 1596 ***(refd)***
Shantaram Tukram Patil v. Dagubai Tukram AIR [1987] Bom 182 ***(refd)***
State of Punjab v. Kasturi Lal AIR [1999] SC 2554 ***(refd)***
Talab Hj Hussain v. Madhukar Purshottam Mondkar AIR [1958] SC 376 ***(refd)***
Tengku Abdul Muiz Shah & Ors v. Public Prosecutor [1983] 1 MLJ 422 ***(refd)***
Vedehi Saran v. Municipal Board, Kouch [1978] All LJ 907 ***(refd)***
Vishnu Deshpande v. Emperor AIR [1941] Nag 97 ***(refd)***
Wilson v. Nightingale [1846] 8 QB 1034 ***(refd)***
Wood v. Riley [1867] LR 3 CP 26 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)
Courts of Judicature Act 1964, ss. 16(a), 22, 25, 31, 35, 87
Criminal Procedure Code, ss. 311, 315, 316, 317, 323, 325
Federal Constitution, arts. 121(2)(a), (c), 128(1), (2), (3)
Mutual Assistance in Criminal Matters Act 2002, s. 8(3)
Penal Code, s. 409
Rules of the Federal Court, rr. 99(2), 137

Civil Procedure Code [Ind], s. 151
Criminal Procedure Code [Ind], s. 482

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A N Saha, *The Code of Civil Procedure,* 5th edn, vol I, pp 666-667
Craies on Statute Law, 7th edn, p 169
Bindra's Statutory Interpretation, 9th edn, pp 508, 111, 1182-1184, 1597-1598
GP Singh, *Principles of Statutory Interpretation,* 10th edn, p 194
Sir Jack Jacob, *The inherent Jurisdiction of the Court:* Current Legal Problems (1970), vol 23, p 24
Willoughby, *Constitutional Law,* Pt I, p 65

For the appellant - Dato' Muhammad Shafee Abdullah (Frida Krishnan, Amy Chong Boon Chin & Sarah Maalini Abishegam with him); M/s Shafee & Co
For the respondent - Datuk Muhammad Yusuf Zainal Abidin (Tun Abd Majid Tun Hamzah with him) DPPs

[Appeal from Court of Appeal, Criminal Appeal No: W-09-27-2005]

Reported by WA Sharif

JUDGMENT

Augustine Paul FCJ:

[1] Section 87 of the Courts of Judicature Act 1964 ("s. 87") confines the appellate jurisdiction of the Federal Court to a decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction. Accordingly, there is no right of appeal to the Federal Court in a criminal matter that originated in the subordinate courts. Does this violate art. 121(2)(a) of the Federal Constitution ("art. 121(2)(a)") which provides that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof without any qualification? If it does, an appeal to the Federal Court will be competent as the restriction on the right of appeal will be unconstitutional. If it does not, by virtue of art. 121(2)(a) being read with art. 128(3) of the Federal Constitution ("art. 128(3)"), does it mean that a person who is dissatisfied with a decision made by the Court of Appeal in respect of a criminal matter that originated in the subordinate courts is left with no further avenue to seek redress? In such circumstances can he invoke the inherent jurisdiction of the Federal Court as contained

A in r. 137 of the Rules of the Federal Court ("r. 137") to seek a remedy? These are the dominant issues that require to be addressed in this proceeding before us.

[2] The accused was charged in the Sessions Court at Kuala B Lumpur with an offence under s. 409 of the Penal Code together with an alternative charge under the same section. He claimed trial. On 26 April 2005 the prosecution sought to admit in evidence, in the course of its case, the evidence of six witnesses recorded in Hong Kong pursuant to s. 8(3) of the Mutual Assistance in C Criminal Matters Act 2002. The defence objected to the admissibility of the record of evidence. The learned Sessions Court Judge upheld the objection on the ground that there was no compliance with the Evidence Act and the Criminal Procedure Code. Accordingly, he ruled that the record of evidence was D inadmissible. The prosecution then requested the High Court to revise the ruling made by the learned Sessions Court Judge. On 29 April 2005 the High Court exercised its power of revision and ordered that the record of proceedings be admitted in evidence. The accused appealed to the Court of Appeal. The appeal was E dismissed by the Court of Appeal on 1 July 2005. The accused then filed a notice of Appeal in this Court on 8 July 2005 pursuant to s. 87. The accused also filed a motion under r. 137 praying for this court to exercise its inherent jurisdiction to review the decision of the Court of Appeal.

F **[3]** When the hearing commenced in this court it was contended by the prosecution that the appeal was not competent pursuant to s. 87 as it was not in relation to a criminal matter decided by the High Court in the exercise of its original jurisdiction. Arguments were advanced by both parties on the constitutional G validity of s. 87 as to whether it violated art. 121(2)(a). Learned counsel's argument that a decision made in the exercise of revisionary power is part of the original jurisdiction of the High Court thereby rendering the decision appealable under s. 87 will be addressed by YAA Dato' Richard Malanjum CJ (Sabah and H Sarawak). With regard to the motion filed by the defence under r. 137 the prosecution said that the rule did not come within the meaning of s. 16 of the Courts of Judicature Act 1964 ("s. 16") pursuant to which it was made. It was argued that any rule made under s. 16 must be procedural in nature and refer to a matter I over which the Federal Court has jurisdiction. Accordingly, it was said that r. 137 is not valid as it did not satisfy the requirements

of s. 16. It was also contended that in any event this was not a case where the defence could avail itself of the inherent jurisdiction of the court.

[4] We shall now address both the issues argued before us.

The Constitutional Validity Of s. 87

[5] Article 121(2)(a) provides that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof. The jurisdiction is unqualified. However art. 128(3) provides that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law. The jurisdiction is qualified as it is subject to it being provided by federal law. If the word "jurisdiction" in art. 128(3) is a reference to the jurisdiction conferred by art. 121(2)(a) it will result in the wide power contained in art. 121(2) being curtailed by the qualification in art. 128(3). They will be inconsistent with each other. There is a rule of construction that if two sections of a statute cannot be reconciled it is often said that the last must prevail (see *Wood v. Riley* [1867] LR 3 CP 26; *KM Nanawati v. State of Bombay* AIR [1961] SC 112). But this rule must be followed only as a matter of last resort. As Lord Evershed MR said in *Eastbourne Corpn v. Fortes Ltd* [1959] 2 All ER 102 at p 107:

> It is no doubt true that if two sections of an Act of Parliament are in truth irreconcilable, then *prima facie* the latter will be preferred. But these are arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the parliamentary intention.

If, therefore, arts. 121(2)(a) and 128(3) are irreconcilable it is art. 128(3) that will prevail thereby rendering art. 121(2)(a) nugatory.

[6] The inconsistency that will arise when arts. 121(2)(a) and 128(3) are read together must be avoided. In this regard useful reference may be made to *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 where Raja Azlan Shah FJ (as His Majesty then was) said at p 190:

> When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself. A passage from the Privy Council judgment in *Hinds v. The Queen, supra*, is of some assistance (page 392):

> That the Parliament of Jamaica, has power to create a court … is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution. …
>
> This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government.

And *Bindra's Statutory Interpretation* 9th edn says at p 508:

> The acceptable principle of construing statutes is that two provisions regulating the same subject should be construed to be consistent with each other. If this be true of an ordinary statute, it is equally true of such a ruling instrument as the Constitution.

[7] What first requires to be resolved is whether art. 128(3) can be read as being applicable to only art. 128(1) and (2) thus leaving art. 121(2)(a) to be interpreted as it reads. This is resolved by *Bindra's Interpretation of Statutes* 9th edn which says at pp 1182-1184:

> The Constitution must be read as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. If the plain meaning of an uncontradicted constitutional provision is to be disregarded, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If then it is found that to give a particular meaning to a word of indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected. …

> In construing a constitutional provision, it is the duty of the Court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. The subject, the context, and the intention of the body inserting a word in the federal Constitution are all to be considered in determining its construction.

The different provisions of a Constitution bearing upon a particular subject must therefore be read together. With regard to the concern expressed earlier it must be observed that art. 128(1) and (2) do not deal with the appellate jurisdiction of the Federal Court while art. 128(3) deals with just such jurisdiction. As they do not deal with the same subject-matter it follows that art. 128(3) is inapplicable to art. 128(1) and (2). Thus art. 128(3) must be read with other parts of the Constitution with which it has a bearing. This brings into focus art. 121(2)(a). However, as stated earlier there will be an inconsistency between them if they are read together.

[8] The conflict between arts. 121(2)(a) and 128(3) can be resolved if they can be construed as dealing with different subject matters. The meaning of both the articles is governed by the use of the word "jurisdiction" in them. As Diplock LJ, in considering the different senses in which the word "jurisdiction" can be used, said in *Garthwaite v. Garthwaite* [1964] 2 All ER 233 at p 241:

> The High Court is the creation of statute, and its jurisdiction is statutory. As was pointed out by Pickford, LJ, in *Guaranty Trust Co of New York v. Hannay & Co* (1914-15) All ER Rep at p 35; [1915] 2 KB at p 563, the expression 'jurisdiction' of a court may be used in two different senses, a strict sense (which he regarded as the only correct one) and a wider sense. I think, with respect, that he defined the strict sense too narrowly, for it would not embrace the court's lack of jurisdiction to entertain a suit based on the personality of a party, as for instance against a foreign sovereign or ambassador. However, it is important for the purposes of the present appeal to distinguish between the two senses in which the expression is used. In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine

A issues which fall within its 'jurisdiction' (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant relief in particular circumstances.

B It is therefore clear that the word "jurisdiction" can mean, in its narrow and strict sense, the authority and power to hear and determine cases and, in its wider sense, the manner in which the power is to be exercised. It has been construed by the courts in both the senses or only in one sense depending on the context in C which it has been used. Thus as Hepworth J said in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1 at p 5:

> It is also necessary to consider the meaning of the word 'jurisdiction' in section 47 of the Courts Ordinance, 1948, and the D Second Schedule thereto. Every paragraph of the Second Schedule, except one, begins with the word 'jurisdiction' and the word also appears in the heading to that part of the Courts Ordinance in which section 47 appears. *Strouds Judicial Dictionary*, 3rd Edn, Vol 2, at page 1544, states that the word 'jurisdiction' can have two meanings, in one sense meaning 'conferring power' E and in the other meaning 'an area or district'. In my view a combination of these is the meaning of the word as used in the Second Schedule, that is that it means the conferring of power to take cognizance of the laws in force in an area or district. If this is taken as its correct meaning then the Second Schedule can be F said to confer power on the Court to apply the laws as to limitation in the manner prescribed including power to extend time where specific provision for so doing is made.

Further reference may be made to *Anowar Hussain v. Ajoy Kumar* AIR 19599 Assam 28 where Sarjoo Prosad CJ said at p 50:

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> The sense in which the word 'jurisdiction' has been used in section 1 of the Judicial Officers' Protection Act, was laid down in the earliest case of the Allahabad High Court, *Teyen v. Ram Lal,* reported in ILR 12 All 115 (F). Sir John Edge CJ, in that case held that 'the word "jurisdiction" is used in Act XVIII of H 1850 in the sense in which it was used by the Privy Council in *Calder v. Halkel* 2 Moo Ind App 293 (T). It means authority or power to act in a matter and not authority or power to do an act in a particular manner or form'.

I

In *Garthwaite v. Garthwaite* [1964] 2 All ER 233 Lord Diplock used the word "jurisdiction" in the strict sense only. If the word "jurisdiction" appearing in arts. 121(2)(a) and 128(3) can be construed in its different senses the inconsistency between them can be avoided. But is that possible?

[9] In determining the proper meaning and relationship between arts. 121(2)(a) and 128(3) it is necessary to consider the basic rules governing such an exercise. In *Jennings v. Kelly* [1940] AC 206 it was held that in construing a section of an Act of Parliament it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. Similarly in *Canada Sugar Refining Co v. R* [1898] AC 741 it was held that every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute. Different sections, amendments and provisions relating to the same subject must be construed together and read in the light of each other (see *Gayler v. Wilder* 13 L Ed 504). A safe guide to the interpretation of sweeping general words, which are difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them; and if it is found that a number of such expressions have to be subjected to limitations and qualifications, and that such limitations and qualifications are of the same nature, that circumstance forms a strong argument for subjecting the expression in dispute to a like limitation and qualification (see *Blackwood v. R* [1882] 8 App Cas 82). As Lord Tenterden said in *Bywater v. Brandling* [1828] 7 B & C 643 at p 660:

> In construing Acts of Parliament we are to look not only at the language of the preamble or of any particular clause, but at the language of the whole Act. And if we find in the preamble or in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause.

Thus if one section of an Act, for instance, required that "notice" should be "given", a verbal notice would, generally, be sufficient, but if another section provided that it should be "served" on a

person, or "left" with him, or in a particular manner or place, it would obviously show that a written notice was intended (see *Wilson v. Nightingale* [1846] 8 QB 1034; *R v. Shurmer* [1886] 17 QBD 323). Accordingly, two or more sections of a statute may require to be read together in order to ascertain their proper meaning. Similarly a Constitution must be read as a whole. As Willoughby on Constitutional Law Pt I says at p 65:

> The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper and indeed imperative, to construe one part in the light of the provision of the other parts.

At this stage it is pertinent to refer to *Courtauld v. Legh* [1869] LR 4 Ex 126 where Cleasby B said that it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament. However, as *Craies on Statute Law*, 7th edn says at p 169:

> The presumption that the same words are used in the same meaning is however very slight and it is proper, 'if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act' (per Turner LJ in *Re National Savings Bank* [1866] LR 1 Ch App 547, 550).

The presumption that a word has been used consistently will more readily be abandoned if the context in which it appears in one place in an Act compels some other than the ordinary meaning to be placed upon it (see *Mort v. Bradley* [1916] SALR 129).

[10] In ascertaining the meaning of the word "jurisdiction" in both the articles it must be observed that the marginal note to art. 121 reads as "Judicial power of the Federation". As this article deals with judicial power the word "jurisdiction" appearing in art. 121(2)(a) is a reference to the authority and power to determine appeals. In any event the language of art. 121(2)(a) itself shows in clear terms that it deals with the authority to determine appeals and not with the manner of exercise of such power. This is the meaning of the word in its narrow and strict sense. If indeed the word "jurisdiction" in art. 128(3) can be construed in the wider sense there will be harmony between both the articles; while art. 121(2)(a) will relate to the authority and power to determine appeals art. 128(3) will deal with the provision of federal laws on the manner of exercise of the power. This would depend on the context in which the word "jurisdiction" has been used in art.

128(3) which in turn would depend on the nature of laws that may be provided by federal law. This is controlled, firstly, by the use of the word "such" in art. 128(3) the material part of which states that "The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court thereof shall be such …" In commenting on the significance of the word Tek Chand J said in *Commissioner of Income Tax, Punjab v. Shree Jagan Nath* AIR [1957] Punjab 226 at p 232:

> In its grammatical usage, and in its natural and ordinary sense, the word 'such' is understood to refer to the last antecedent, unless, the meaning of the sentence would thereby be impaired, which does not seem to be the case here.

The antecedent to the word "such" in art. 128(3) is "The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof …". This means that the federal law that may be provided under art. 128(3) must be in relation to the jurisdiction of the Federal Court to determine appeals. Secondly, the use of the definite article "the" as the opening word of art. 128(3) is extremely significant to show its extent and ambit. It is defined in *Webster's New World Dictionary* 6th edn, *inter alia*, as:

> … the meaning is controlled by the basic notion 'previously recognised, noticed, or encountered' in distinction to A, AN … .

As *Bindra's Interpretation of Statutes* 9th edn says at pp 1597-1598:

> As regards implication of the article 'the', refer to *Consolidated Coffee Ltd v. Coffee Board, Bangalore* AIR [1980] SC 1468 and *Ishwari Singh v. State of Uttar Pradesh* [1980] All LJ 984 (DB). 'The' is the word used before nouns, with a specifying or particularizing effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant, that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person (*Shri Ishar Alloy Steels Ltd v. Jayaswals Naco Ltd* [2001] 3 SCC 609).

The use of the word "The" preceding the word "jurisdiction" in art. 128(3), that is to say, "The jurisdiction …", is therefore a reference to a jurisdiction that has been previously recognised. It was previously used in art. 121(2)(a). The word "jurisdiction" has therefore been used in art. 128(3) in the same context as it has been used in art. 121(2)(a). Since it has been used in the same context in both the articles it must carry the same meaning.

[11] The corollary is that there will be a conflict between the general power contained in art. 121(2)(a) and its qualification contained in art. 128(3). While art. 121(2)(a) gives an unqualified right of appeal to the Federal Court art. 128(3) provides that the right shall be such as may be provided by federal law; thereby empowering the legislature to restrict the right of appeal to the Federal Court. Any restriction on the right of appeal to the Federal Court would conflict with the unqualified power. It is this apparent inconsistency that requires to be resolved bearing in mind the rule, referred to earlier, of construing two provisions in a constitution dealing with the same subject matter to be consistent with each other.

[12] In construing art. 121(2)(a) in the light of art. 128(3) useful reference may be made to *Goodwin v. Phillips* 7 CLR 1 where O'Conner J in referring to a conflict between general and special provisions said at p 14:

> The conflict between the two sections is one of the kinds to which Sir George Jessel MR refers in *Taylor v. Oldham Corporation* 4 Ch D 395 where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general proviso, and the general provisions, insofar as it is inconsistent with the special provision, must be deemed not to apply.

This raises the question of whether art. 128(3) can be read as a proviso to art. 121(2)(a). In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha* AIR [1961] SC 1596 Hidayatullah J said that as a general rule a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. In *Local Government Board v. South Stonehan Union* [1909] AC 57 Lord MacNaghten said that a proviso can be a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. The proper way to regard a proviso is as a limitation upon the effect of the principal enactment (see *Raj Rani v. Dwarka Nath* AIR [1933] Oudh 491). Its function is to except and deal with a case which would otherwise fall within the general language of the main enactment (see *Vedehi Saran v. Municipal Board, Kouch* [1978] All LJ 907). As *Bindra's Interpretation of Statutes* 9th edn says at p 111:

> A proviso, which is in fact and in substance a proviso, can only operate to deal with a case, which but for it, would have fallen within the ambit of the section to which it is a proviso. The section deals with a particular field and the proviso excepts or takes out or carves out from the field a particular portion, and therefore it is perfectly true that before a proviso can have any application, the section itself must apply. A proviso is nothing but an exception to the enacting clause. Its object is to cut down or qualify something which has gone before it.

Thus as Kapur J said in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Vograj Sinha* AIR [1961] SC 1596 at p. 1690:

> The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment.

In view of the function of a proviso the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided (see *Govt of the Province of Bombay v. Hormusji Manekji* AIR [1947] PC 200). As *Principles of Statutory Interpretation* 10th edn by GP Singh says at p 194:

> This is so because, 'the legislative device of exclusion is adopted only to exclude a part from the whole, which but for the exclusion, continues to be a part of it' and words of exclusion are presumed to have some meaning and are not readily recognised as mere surplusage.

[13] As art. 128(3) is a limitation and qualification upon the general power contained in art. 121(2)(a) it must therefore be construed as a proviso to art. 121(2)(a). Accordingly, when art. 128(3) is read as a proviso to art. 121(2)(a) the jurisdiction of the Federal Court to determine appeals shall be such as may be provided by Federal law. This approach will give a harmonious interpretation to art. 121(2)(a) and art. 128(3) and will not affect the validity of either one of them. The result is that the constitutionality of s. 87 cannot be impugned as it is a federal law enacted to confer jurisdiction on the Federal Court to determine appeals on the authority of arts. 121(2)(a) and 128(3) read together. The notice of appeal filed by the accused against the decision of the Court of Appeal is therefore not competent. The preliminary objection raised by the prosecution is thus upheld.

[14] The question of whether the accused has any other remedy available to pursue his complaint in the exercise of the inherent jurisdiction of the court will now be considered.

The Inherent Jurisdiction Of The Court Under r. 137

[15] Rule 137 reads as follows:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[16] A matter of immediate consideration, in light of the objection raised by the prosecution, is whether r. 137 comes within the scope of s. 16 under which it was made. Section 16(a) reads as follows:

> Rules of court may be made for the following purposes:
>
> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, (the Court of Appeal and the Federal Court) in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court (to the Court of Appeal or to the Federal Court) shall be made;

A rule made under s. 16(a) must satisfy two conditions. They are:

(a) the rule must be made for the purpose of regulating and prescribing the procedures and the practice to be followed in the High Court, the Court of Appeal and the Federal Court and

(b) the rule must be in respect of matters over which the courts have jurisdiction.

Thus any rule made under s. 16(a) must be procedural in nature and must be in respect of matters over which the courts have jurisdiction. With regard to condition (a) of s. 16(a) reference may be made to *Sarwan Ram v. Amar Nath* AIR [1980] Punj & Haryana 162 where it was held that s. 151 of the Indian Code

of Civil Procedure ("s. 151"), which is similar to r. 137, confers only a procedural jurisdiction. In his article entitled *The inherent Jurisdiction of the Court: Current Legal Problems* (1970) Vol 23 Sir Jack Jacob says at p 24:

> The inherent jurisdiction of the Court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.

Condition (a) of s. 16(a) has therefore been satisfied as r. 137 is procedural in nature. Condition (b) of s. 16(a) requires a consideration of whether the inherent power is a matter over which the courts have jurisdiction. The inherent power under r. 137 is a necessary element of the jurisdiction of the Court. As Lord Morris said in *Connelly v. DPP* [1964] 2 All ER 401 at p. 409:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

And at p. 410:

> The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.

Thus r. 137 does not give any new powers; it only provides that those which the court already inherently possesses shall be preserved and is inserted lest it should be considered that the only powers possessed by the court are those expressly conferred by law (see *Emperor v. Nazir Ahmad* AIR [1945] PC 18). This view has been recognised by this court in *Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29. It is therefore clear that the inherent jurisdiction is of common law origin and is necessary for the court to act effectively within the jurisdiction that has been conferred. However, the assimilation of this common law rule into our judicial system would depend on whether it has been recognised by federal law. This is because art. 121(2)(c) of the Federal Constitution ("art. 121(2)(c)") provides that the

Federal Court shall have such other jurisdiction as may be conferred by or under federal law. In dealing with the question of whether this common law rule comes within the ambit of art. 121(2)(c) Steve Shim CJ (Sabah and Sarawak) said in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 at p 663:

> Where there is a clear case of injustice being committed, the Federal Court, as the apex court in the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r. 137 of the Rules of the Federal Court 1995 ('the RFC'). This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v. Ng Swee Keat & Anor* (Civil Appeal No 02-03-98(B), when Mohamed Dzaiddin Chief Justice said:
>
> > Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.
>
> In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s. 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl (c) of art 121(2) of the Constitution which confers on the Federal Court 'such other jurisdiction as may be conferred by or under federal law.'
>
> Section 3(1)(a) under the heading 'Application of UK Common Law, rules of equity and certain statutes', states as follows:
>
> > Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:
> >
> > (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956 …
> >
> > Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

> In 1956, the common law of England clearly recognized the superior courts as having inherent jurisdiction to deal with issues of injustice in certain cases (see *Halsbury's Law of England* (4th Ed) Vol 37 para 14).

It follows that the inherent jurisdiction of the superior courts under the common law has been made applicable to Malaysia by s. 3(1)(a) of the Civil Law Act 1956 ("s. 3(1)(a)"). Accordingly, it comes within the meaning of Article 121(2)(c) as it is a jurisdiction that has been preserved, not by, but under federal law. It can now be discerned with ease that cases such as *Filotek Trading Sdn Bhd v. Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 CLJ 135 and *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Ors* [2005] 4 MLJ 636 had expressed their views on the inherent jurisdiction of the courts without the benefit of the passage from the judgment in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 reproduced earlier. As r. 137 relates to a matter in respect of which the courts have jurisdiction it means that condition (b) of s. 16(a) has also been satisfied.

[17] The corollary is that r. 137 comes within the scope of s. 16(a) and is therefore lawful. It must be added that even if it can be argued that r. 137 does not conform with the requirements of s. 16(a) it makes no difference as r. 137 merely preserves what has been brought into force by s. 3(1)(a). The power of this court to hear any application or to make any order as may be necessary to prevent injustice under r. 137 has been recognised in cases such as *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun* [2002] 3 CLJ 577 and *Dato Seri Anwar bin Ibrahim v. PP* [2004] 4 CLJ 157 and, recently, in *Chu Tak Fai v. Pendakwa Raya* [2006] 4 CLJ 931.

[18] The motion before us is for a review of an order made by the Court of Appeal. Thus the resultant matter for consideration is whether the inherent power of the Federal Court is available only to review its own decisions or also extends to reviewing decisions made by the Court of Appeal. The language of r. 137 itself is not restrictive so as to limit its application to only reviewing decisions of the Federal Court. Under r. 137 the Federal Court has inherent powers:

A (a) to hear any application ("part (a)")

(b) or to make any order as may be necessary to prevent injustice ("part (b)")

B (c) or to prevent an abuse of the process of the court ("part (c)").

The words "hear any application …" in part (a) are of wide import and indicate that an application that may be heard by the Federal Court under r. 137 is not one that is confined to a matter C arising in that court only. Similarly the words "… make any order …" in part (b) indicate that they are wide enough to extend to the making of orders even in respect of matters that did not arise in the Federal Court. Thomas J, in commenting on the scope and extent of the inherent power contained in s. 482 which contains D words similar as in part (b), said in *Abubacker Kunju v. Thulasidas* [1995] Cr LJ 1664:

> It is settled proposition that inherent powers of the High Court envisaged in s. 482 of the Code is supervisory in nature 'to give E effect to any order under this Code or to prevent abuse of the process of any court'. The words 'or otherwise to secure the ends of justice' in the said section must be construed on the principle of *ejusdem generis*. When Parliament reserved inherent powers only to the High Courts so far as criminal proceedings are concerned, it is intended to be exercised in respect of F proceedings pending in the courts subordinate to it or pending before itself.

This approach is supported by r. 99 of the Rules of the Federal Court ("r. 99"). It reads as follows:

G > (1) All applications shall be made by filing the notice of motion and every affidavit intended to be used in support thereof and eight copies thereof, unless the application is made to a single Judge of the Court in which case two copies only need be filed. Such documents shall be filed in the Registry, and a copy in the H Registry of the Court of Appeal where the judgment, order or decision complained of was given or made. Copies of such application and affidavits shall immediately be served on all necessary parties.
>
> (2) The Registrar of the Court shall follow a procedure similar I so far as possible to the procedure relating to the entry of appeals and the Registrar of the Court shall forthwith inform the Public Prosecutor and the applicant and any other necessary party to the application of the place and date of hearing of the application.

Rule 99 deals with the procedure to be followed in all applications in the Federal Court in criminal matters which would include, as of necessity, one under r. 137. It provides that a copy of the application shall be filed "… in the Registry of the Court of Appeal where the judgment, order or decision complained of was given or made." This relates to a complaint in respect of a judgment, order or decision of the Court of Appeal. It is implicit that r. 99 does not give the right to make the complaint but only prescribes the procedure to be followed when there is a complaint. Under the Rules of the Federal Court there is no other rule dealing with the right to make such a complaint except for r. 137. An application may therefore be made to the Federal Court in respect of a complaint regarding any judgment, order or decision of the Court of Appeal. Rule 99(2) makes it clear that such a complaint is different from an appeal. It follows that an application may be made to the Federal Court under r. 137 even in respect of matters decided by the Court of Appeal. The result of the context and wide range of r. 137 is that the words "the court" in part (c) must be construed as "any court" and not as provided in s. 2 of the Rules of the Federal Court. Such a departure from the meaning given to a particular word in the definition clause of a statutory provision is permissible if the context in which the word is used warrants it as explained by this court in *Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177. Thus the Federal Court may review decisions made by the Court of Appeal in the exercise of its inherent powers.

[19] It is now appropriate to consider the characteristic features of the inherent jurisdiction of the court and the circumstances in which resort can be had to it. In *Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 Edgar Joseph Jr FCJ considered the salient features of the jurisdiction by referring to various parts of the article by Sir Jack Jacob. In defining inherent jurisdiction the learned author of the article said at p 51:

> … the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

In explaining the relationship between the inherent jurisdiction and rules of court the learned author said at p 50:

A

> The powers of the court under its inherent jurisdiction are complementary to its powers under rules of court; one set of powers supplements and reinforces the other. The inherent jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the rules.

B

The learned author then distinguished between inherent jurisdiction and statutory jurisdiction as follows at p 24:

> The source of the statutory jurisdiction of the court is, of course, the statute itself, which will define the limits within which such
C jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law; so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.

The learned author then directed attention to the point that
D powers conferred by rules of court are generally additional to and not in substitution of powers arising out of the inherent jurisdiction of the court in these terms at p 25:

> The inherent jurisdiction of the court may be exercised in
E any given case, **notwithstanding that there are rules of court governing the circumstances of such case.** The powers conferred by rules of court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive,
F so that in any given case, the court is able to proceed under either or both heads of jurisdiction. (emphasis added).

In explaining the juridical basis of inherent jurisdiction the learned
G author said at p 27:

> … the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticized as
H being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its
I immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law.

And in the next paragraph, in explaining the usefulness of the inherent jurisdiction, the learned author added at pp 50 and 51:

> On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respects in which the powers arising out of the inherent jurisdiction differ from those conferred by rules of court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment.

[20] In India there are also specific provisions of law dealing with the inherent powers of the court. They are similar to r. 137. Section 151 reads as follows:

> Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Section 482 of the Indian Criminal Procedure Code ("s. 482") reads as follows:

> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

[21] Indian authorities on the scope and limitations on the exercise of the inherent power of the court would therefore be of relevance in the application of r. 137. The power is undefined and indefinable and must be exercised with great caution. It has to be exercised sparingly with circumspection and in the rarest of rare cases (see *Kurukshetra University v. State of Haryana*, AIR [1977] SC 2229). It must be so exercised only where resort to it is justified by the tests laid down in the section itself which provides for inherent jurisdiction (see *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, AIR [1958] SC 376). It is to be exercised *ex debito justitiae* to do real and substantial justice for the

A administration of which alone courts exist (see *State of Punjab v. Kasturi Lal* AIR [1999] SC 2554). It is in addition to and complementary to the powers conferred under the Code of Civil Procedure and cannot override the provisions of the Code (see *Manoharlal Chopra v. Seth Hiralal*, AIR [1962] SC 527). It is not B intended to enable a court to create rights in the parties, but is meant to enable the court to pass such orders for the ends of justice as may be necessary considering the rights which are conferred upon the parties by substantive law (see *Shantaram Tukram Patil v. Dagubai Tukram*, AIR [1987] Bom 182). The C inherent power cannot be exercised when the Code of Civil Procedure itself provides for a particular situation or contingency or points out to the procedure to be adopted (see *A Venkateswara Rao v. K Sibaiah*, AIR [1978] AP 403). It cannot be invoked to nullify an express statutory provision (see *Mahesh Chandra Gupta* D *v. State of MP*, AIR [1991] MP 226). Nor can it be invoked to override an express provision of law prohibiting interference (see *Pambhi v. State*, AIR [1952] All 526), or to pass an order which would conflict with the provision of the Code of Civil Procedure (see *Re Gurunath Narayan Betgori (Criminal Revision Application No* E *80 of 1924)*, AIR [1924] Bom 485), or to extend the powers given by the statute (see *Marudayya Thevar v. Shanmugasundara Thevar*, AIR [1926] Mad 139), or where there is an express provision in the statute (see *Vishnu Deshpande v. Emperor*, AIR [1941] Nag 97). It is not usually invoked when another remedy is available, eg, a F civil proceeding (see *Re Lloyds Bank (Criminal Application for Revision No 261 of 1933)*, 35 Cr LJ 1028) or an appeal (see *Hari Shankar Dinanath v. State of Madhya Pradesh*, AIR [1953] Nag 254). Thus where an order of court is appealable the court cannot exercise its inherent powers to rectify an error when there is a G failure to appeal. In this regard reference may be made to *Balmer Lawrie and Co Ltd v. Assam Brook Estates Ltd* AIR [1979] Cal 64 where Bonnerjea J said at p 66:

> The order dated 6-7-78 was an appealable order under O. 43 r. H 1(f) but the petitioner did not prefer any appeal therefrom. The result is that the order has become final and binding on the petitioner. The inherent power of Court cannot be invoked for neutralising the effect of the order dated 6-7-78. In AIR 1970 SC 997 at p 998 *(Nain Singh v. Koonwargie)* it has been held as follows:
>
> I
>
> > Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such

> provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of s. 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further the power under s. 151 of the Code cannot be exercised as an appellate power.

Mr Sinha is asking the Court to use the inherent power to restore the defence and extend time for filing affidavit of documents, unless the Court sits on appeal over the order dated 6-7-78, none of the prayer in the petition can be granted. Mr Sinha, in fact is asking the Court to use the inherent power as an appellate power which is completely disapproved by the Supreme Court.

In AIR 1962 SC 527 (*Monohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*) the Supreme Court held at page 537:

> Inherent jurisdiction of the Court to make orders *ex debito justitiae* is undoubtedly affirmed by s. 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provisions should normally be regarded as exhaustive.

Any order passed on this application in terms of the prayer in the petition will have the effect of setting aside the order dated 6-7-78 and would amount to exercising inherent power as an appellate power. In view of this I have no jurisdiction to entertain this application as the same is misconceived. In the premises, this application is dismissed with costs.

Where, however, there is no right of appeal the court may exercise its inherent powers to rectify an error. In this regard *The Code of Civil Procedure,* 5th edn, vol I by A N Saha says at pp. 666-667:

> In an Orissa case on the death of decreeholder during execution proceeding, the alleged legal representatives of the deceased decree-holder sought to be substituted but the petition was wrongly rejected. An application to recall the order was dismissed for default. The legal representatives filed an appeal against refusal to recall the order. But the appeal plainly was not tenable. It could not be treated as appealable on the footing that refusal to recall the order was an order under Order IX, Rule 9, CPC, because Order IX does not apply in execution proceeding. Against the order dismissing the appeal, a revisional application was filed. The revision failed because the appeal was not at all competent.

A Nevertheless the High Court under the inherent power set aside the order rejecting the application for substitution and directed the executing Court to reconsider the same (*Sarat Chandra Patra v. Narsingha Patra,* AIR [1988] Ori 4: [1987] 63 Cut LT 86: [1987] 1 Ori LR 355).

B The majority judgment of this court in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 demonstrates the application of this rule. In that case the appeal was grounded on the validity of the record of appeal which had been held by the Court of Appeal to be defective. It was C unanimously held that the matter was not appealable. However, the majority proceeded to rectify the error with Steve Shim CJ (Sabah and Sarawak) and Mohtar Abdullah FCJ making express reference to r. 137 as the basis of authority to do so.

D **[22]** The inherent power of the Federal Court under r. 137 can therefore be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy. In commenting on the meaning of the word "injustice" in this context Nik Hashim Nik Ab Rahman FCJ in E writing for this court in *Chu Tak Fai v. Pendakwa Raya* [2006] 4 CLJ 931 said at p 946:

> Of crucial importance is the meaning of the word 'injustice'. 'Injustice' means (i) a lack of fairness or justice (ii) an unjust act (*The Concise Oxford Dictionary,* 9th Edn, p 700). Whether an act F is unjust or not is a question of law … so as to cause an injustice to the applicant or an abuse of process of the court which needs to be rectified or prevented.

It must, of course, be one that comes within the scope of r. 137. G The burden is on the applicant to satisfy this court that the requirements of r. 137 have been complied with.

[23] The accused is therefore entitled to pursue his complaint in this court in the exercise of its inherent jurisdiction under r. 137. The burden is on him to satisfy this court that the requirements H of r. 137 have been complied with. This will be heard on a date to be fixed.

Richard Malanjum CJ (Sabah & Sarawak):

I **[24]** I have the advantage of reading in draft the judgment of Augustine Paul FCJ ('the main judgment'). On the issues discussed therein I am in agreement with his conclusions.

[25] However, I noted that there is another aspect in the submission of learned counsel for the applicant which should be considered. The gist of his submission is that in exercising his revisionary power the High Court Judge was actually exercising his original jurisdiction within the meaning of s. 87 of the Courts of Judicature Act 1964 (the CJA).

[26] The learned Deputy Public Prosecutor in reply argued otherwise. He submitted that the exercise of revisionary power was nothing more than a continuation of the proceeding in the subordinate court in respect of the same case.

[27] I think the point raised can be determined without dwelling into the facts of this case which have already been adequately dealt with in the main judgment. What needs to be examined here is the law which deals with the nature of jurisdiction of the High Court when it exercises its revisionary power.

[28] Sections 31 and 35 of CJA stipulate certain powers of the High Court and they read:

> 31. Revision of criminal proceedings of subordinate courts
>
> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts *in accordance with any law for the time being in force relating to criminal procedure.*
>
> 35. General supervisory and revisionary jurisdiction of High Court
>
> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, *if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal,* in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
>
> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court. (emphasis added).

[29] In the Criminal Procedure Code ('CPC') there are also provisions which empower a judge of the High Court with revisionary power. They are ss. 323 and 325 which read:

> 323. Powers to call for records of subordinate Courts
>
> (1) *A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court* for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
>
> (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.
>
> 325. Powers of Judge on revision
>
> (1) *A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge,* in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction. (emphasis added).

[30] Subsection (1) of s. 325 therefore empowers a High Court Judge in the course of exercising his revisionary power, after calling for the record of proceedings *suo motu* or after it came to his knowledge, to make such order as may be made under ss. 311, 315, 316 and 317 of CPC, namely, the respective powers of a High Court Judge to order a stay of execution pending appeal, the arrest of respondent in certain cases pending an appeal against acquittal, to make a decision as though there is an appeal before the High Court and the making of an order to take further evidence. But there is no power to reverse an acquittal to one of conviction when exercising his revisionary power. Subsection (3) thereof makes it clear.

[31] Now, in the matter before us the learned High Court Judge in his written judgment made it very clear that he was exercising his revisionary power pursuant to s. 31 of CJA read with s. 323 of CPC. Was he therefore exercising an original jurisdiction

notwithstanding that he invoked these relevant statutory provisions? For if he was, then his decision would be within the ambit of s. 87 of CJA which reads:

> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal **in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction** subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal. (emphasis added)

[32] It has been said that a 'revision is not a right and is only a procedural facility afforded to a party, while an appeal is a statutory right conferred on a party. It cannot be said that a proceeding in revision is a continuation of the suit, appeal or trial. It is only a step-in-aid for invoking the powers of superintendence by the Sessions Judge and the High Court for correcting irregularities if any, in the judgments and orders of the subordinate courts. Interference in revision being a discretionary power vested in the superior courts, a revision petition cannot be considered to be a continuation of the proceedings pending in the trial court or the appellate court' (see: *Kunhammad v. Abdul Kader* [1977] KLT 840). Similarly, in *Ku Izham bin Ku Adnan v. Public Prosecutor* [1998] 2 CLJ 956 it was said that the 'object of a revision is to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted in some injury to the due maintenance of law and order or in some undeserved hardship to individuals. The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court.'

[33] At first blush the foregoing views may seem to be in tandem with the analogy drawn by learned counsel for the accused on the similarity between the exercise of revisionary power and the supervisory power of the High Court. The latter is an exercise of its original jurisdiction.

[34] However, to agree with the analogy made will be failing to consider the other relevant statutory provisions which are equally pertinent. Such an approach was adopted in *Lam Kong Co Ltd v. Thong Guan Co Ptd Ltd* [2000] 3 CLJ 769 when considering the issue of whether the Court of Appeal retained any revisionary

power. His Lordship Mohammed Dzaiddin FCJ (as he then was) proceeded to examine the existing statutory provisions and went on to say this:

> It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss. 45-49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886) what remains is its criminal and civil appellate jurisdiction.

[35] This pronouncement, and thus by implication the approach, was recently approved by this court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 when it accepted as correct the foregoing statement. Hence, to determine whether or not a particular exercise of power by the High Court is made pursuant to its original jurisdiction, it must necessarily depend on the statutory provision which governs it. For now one has to accept the fact that the jurisdictions of the courts in this country have been statutorily demarcated. This is allowed by the Federal Constitution (arts. 121 and 128 (3)).

[36] Sections 22 to 25 of the CJA stipulate what are the original jurisdictions of the High Court. Section 31 under which the learned High Court Judge in this matter acted upon is not included. I think the view expressed by Mohamed Dzaiddin J (as he then was) in the case of *Tengku Abdul Muiz Shah & Ors v. Public Prosecutor* [1983] 1 MLJ 422 sums up the true position of the law when he said this, *inter alia*, at p. 423:

> … Except for certain Articles in the Constitution (See Articles 121, 122A, 122B, 122C; 123; 126.), the powers and jurisdiction of the High Court are governed by the Courts of Judicature Act 1964. In the sphere of criminal jurisdiction, the High Court has three jurisdictions, namely, original, appellate and revisionary. With regard to its original jurisdiction, section 22(1)(a)(i) of the Act states that the High Court shall have jurisdiction to try all offences committed within its local jurisdiction … Lastly, under section 31 of the Act, the High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts. Thus, so far it is clear that the High Court has jurisdiction to try all offences committed within its local jurisdiction and to hear appeals and to exercise powers of revision from subordinate courts.

[37] In other words the exercise of revisionary power by the High Court Judge is not in law an exercise of his original jurisdiction and hence does not come within the ambit of s. 87 of the CJA. That should therefore answer the point raised by learned counsel for the accused.

[38] Even if the foregoing approach is deemed too simplistic a view to take, it still does not justify equating wholly the revisionary power of the High Court to its supervisory power as ordinarily understood. To do so would be ignoring the stark differences in the two judicial functions of the High Court. No doubt the end result of each may be quite similar in that both are intended to correct or rectify any error committed by an inferior tribunal, an adjudicating body or a subordinate court. But the similarity ends there. Although s. 35 of CJA refers to supervisory jurisdiction of the High Court together with its revisionary jurisdiction, the exercise of supervisory power is generally in relation to the additional powers of the High Court given under s. 25 of CJA to issue what is commonly known as the prerogative writs such as *certiorari*, mandamus and prohibition. It entails the commencement of a proceeding in the High Court itself unlike an exercise of revisionary power where it is preceded with an existing proceeding in the subordinate court. This matter under consideration is a good illustration. There is therefore merit in the contention by the learned Deputy when he highlighted the fact that the High Court Judge was only exercising his revisionary power on an interlocutory issue in relation to a case which is still pending in the Sessions Court.

[39] My answer therefore to the primary question is that an exercise of revisionary power by a High Court Judge is not an exercise of an original jurisdiction so as to bring it within the ambit of s. 87 of CJA.

[40] For the above reasons the notice of appeal filed by the accused in this court is therefore struck out for want of jurisdiction under s. 87 of the CJA.